Supreme Court, U.S.
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No. 03 754

In The

Supreme Court of the United States

NED B. MAJORS,

Petitioner,

v.

CLIFFORD H. HARDWICK,
AND LYNN G. FEATHERLY,

Respondents.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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92 pp

QUESTIONS PRESENTED

In Dec. 1999, Majors sued Hardwick and Featherly in diversity in the D.S.C., but the suit was dismissed for improper venue on Aug. 29, 2000. On Feb. 15, 2001, Majors sued them in the N.D.Ga., and this suit was dismissed for failure to state a claim. Majors's complaints in both suits are virtually identical.

1. In the N.D.Ga., **under *Erie v. Tompkins***, 304 U.S. 64 (1938), was Majors entitled to application of the GA savings statute to toll an applicable limitations' period?

2. In the N.D.Ga., **under Fed.R.Civ.P. 8**, was Majors entitled to incorporate by reference paragraphs giving other instances of "loss of consortium" into his third count entitled, "Tortious Interference [with] SC Ceremonial Marriage Contract," and to have all adjudged as a claim for "Loss of Consortium."

In Dec. 1998, in GA state court, as a 50 percent shareholder in "TLA," Majors had sued TLA and Featherly, the other 50 percent shareholder, to dissolve TLA (still pending). In Feb. 1999, Featherly, represented by Hardwick, sued Majors for divorce from an alleged common-law marriage despite their knowledge that Majors had been ceremonially married to Ferguson for a year, and Featherly lost in Sept. 1999.

3. In the 11th Circuit, by failing to accord primacy to Majors's state-court decision not to supplement his shareholder's lawsuit with personal claims against Featherly, did the court **(a)** misapply the *Erie* doctrine by not determining that the GA Supreme Court would have given the same primacy to Majors's decision as would have a federal court **under Rule 15(d)** and said forecast would prevail over an inapposite, intermediate state-court case, and **(b)** abuse its discretion in failing to **certify the state-law issues** to appropriate state court?

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PETITION FOR WRIT OF *CERTIORARI*

COMES NOW the petitioner NED B. MAJORS and requests this Court to grant his petition for writ of *certiorari* because the 11th Cir. has departed from Supreme Court precedent and disagreed with other circuits in its application of the *Erie* doctrine to state savings statutes and *res judicata* doctrine, misapplied Rule 8, and compromised Rule 15(d), Fed.R.Civ.P., and uniformity is needed.

PARTY OMITTED

The Hardwick-Featherly partnership is not a party to this petition, although named as a defendant in the D.S.C. and the N.D.Ga. actions

OPINIONS BELOW AND JURISDICTION

The 11th Cir.'s opinion in *Majors v. Hardwick & Featherly* was entered June 18, 2003 (1a), and is noted at 73 Fed.Appx. 388 (11th Cir. 2003) (table). The court denied Majors's petitions for rehearing and rehearing *en banc* on Aug. 22, 2003 (31a). This petition for writ of *certiorari* is filed on or before Nov. 20, 2003, within 90 days of the denial of his rehearing petitions. It is therefore timely, and this Court has jurisdiction under 28 U.S.C. Section 1254(1).

The action filed in the N.D.Ga. was tendered Feb. 15, 2001, based on diversity of citizenship, and was resolved by order entered Mar. 6, 2002 (11a). Majors filed a motion for reconsideration that resulted in a second substantive order on Nov. 25, 2002 (19a).

Previous to filing his action in the N.D.Ga., Majors had filed a virtually identical diversity action in the D.S.C on Dec. 9, 1999, that was dismissed on Aug. 29, 2000, for improper venue under Rule 12(b)(3) (34a).

STATUTES AND RULES INVOLVED

The Georgia laws involved are the savings statute, Ga. Code Ann. 9-2-61 (44a); the *res judicata* statute, 9-12-40 (46a); and rule of civil procedure, 9-11-15(d) (44a). The Federal rules involved are Rules 8 (47a) and 15(d) (48a), Fed.R.Civ.P.

STATEMENT OF CASE

Majors and Lynn G. Featherly had an intimate personal relationship that began in 1988. Together they devised a business of purchasing delinquent, *ad valorem* real property tax liens from county governments. With a cashier's check from a "client," made payable to a county government, Majors or Featherly would deliver the check to a government official and purchase tax lien(s) in the name of the client. The government would issue a certificate to the remitter of the cashier's check, *i.e.,* the client, identifying the tax lien(s) purchased by the client. For attending government sales of delinquent tax liens and purchasing tax liens in the name of a client, Majors and Featherly would receive an agency-for-hire fee, payable in advance, plus an inchoate interest of 50 percent of the net gain in any tax lien certificate that should mature into a property deed after the property is sold.

Usually the owner of the real property would redeem the tax lien by paying to the county government the amount of the delinquent tax, plus accrued interest. Having already received the delinquent tax payment from the client, the government would remit all of these funds to the client. In some cases, an owner would not redeem the property and after a lapse of time the government would issue a tax deed to the client. By prearranged agreement, Majors and Featherly would then, at the client's direction, seek

professionals for the client to quiet title and sell the real property. If successful, the client would recover all costs of tax lien(s) and the remaining net sales proceeds would be split 50 percent to the client and 50 percent to Majors and Featherly.

Their business grew and at their request, the GA Secretary of State incorporated Tax Lien Acquisitions, Inc. ("TLA") as a for-profit corporation in Jan. 1992. Each took 50 percent of the corporate stock, and each became a director of the two-person board of directors. Majors was elected Chief Executive Officer and Secretary. Featherly was elected President and Chair of the Board of Directors. No other person had a stock ownership interest, a corporate office, a directorship, or other interest in TLA.

In Oct. 1997, Majors met SC attorney Patricia Ferguson and in Mar. 1998, married her. He then moved into her SC home. He established a branch office for TLA in Myrtle Beach, SC.

Majors's marriage to Ferguson caused him severe personal and business problems with Featherly. Indeed, the business relationship between Majors and Featherly disintegrated. Because it had two 50 percent shareholders who could not agree, the corporation deadlocked on all decisions. TLA's office manager told Majors that Featherly was embezzling TLA's assets. After investigation, on Dec. 23, 1998, Majors filed a complaint for equitable distribution of TLA's assets, entitled *Majors v. Featherly & TLA*.[1]

Featherly retained GA attorney Clifford H. Hardwick to represent herself and purported to hire

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[1] CAFN: 1998-CV-03450, Fulton Co. Superior Court, GA, filed Dec. 23, 1998, assigned to Hon. Constance Russell.

him to represent TLA although it was deadlocked. Hardwick devised a hardball defense. On Featherly's behalf (a) Hardwick filed a counterclaim that Majors had wasted corporate assets, and (b) Hardwick, for a 40 percent contingency fee from Featherly, filed a petition for divorce whereby Featherly sought a divorce from Majors claiming they had entered into a common-law marriage in 1988,[2] even though both Hardwick and Featherly knew that Majors had been ceremonially married to Ferguson for almost a year. In response to the divorce petition, Majors moved for summary judgment which was granted. The GA supreme court refused review. In *Majors v. Featherly & TLA*, on TLA's behalf, Hardwick filed an answer claiming that Majors had converted TLA assets. In response, Majors moved to disqualify Hardwick as TLA's counsel for having a conflict of interest with his representation of Featherly whom Majors had sued for embezzling from TLA. Majors's motion was granted, and Hardwick was disqualified from representing TLA. In Jan. 2002, a jury found for Majors on Featherly's counterclaims against him, and *vice versa*. No judgment was entered on that verdict and the case remains pending on TLA's claims against Majors.

On Mar. 24, 1999, Hardwick wrote to Ferguson at her home in Myrtle Beach, SC about Featherly's recently filed divorce action against Majors and about Ferguson's affidavit (submitted by Majors in the divorce action in support of his motion for summary judgment) that she (Ferguson) had told Featherly that she and Majors would be getting married and Featherly said nothing about being married to Majors.

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[2] *Featherly v. Majors*, CAFN: 1999-CV-05182, Fulton Co. Superior Court, GA, filed Feb. 16, 1999, assigned to Hon. Cynthia Wright.

Hardwick's letter implied that Ferguson's marriage to Majors was bigamous and therefore illegal. The letter suggested not only that Majors, but also Ferguson, was an adulterer. The letter seemed to imperil Majors's adoption of Ferguson's multi-handicapped daughter.

As a result of receiving the letter, Ferguson was disconsolate, and her dislocation impacted Majors's marriage to Ferguson. Consequently, **Majors filed a diversity action in the D.S.C against Featherly and Hardwick** for, *inter alia,* loss of consortium, libel, and intentional infliction of emotional distress. In pertinent part Majors's complaint stated in par. 49:

> 49. On or about Mar. 24, 1999, Defendant Hardwick also wrote Plaintiff's wife, Patricia Ferguson-Majors and Defendant Hardwick therein stated that Plaintiff's wife's Mar., 1999 affidavit (stating the fact that, before her marriage to Plaintiff, Patricia had told Defendant Featherly that Patricia was marrying Plaintiff and that Defendant Featherly never said a word about being married to Plaintiff) contained materially false statements and Defendant Hardwick threatened Bar sanctions against Plaintiff's wife, if she did not change what Defendant Hardwick termed false statements. **Such conduct by Defendant Hardwick** caused Plaintiff to suffer more emotional distress because Defendant Hardwick's letter caused extreme emotional distress upon Plaintiff's wife and, therefore, **caused further damage to Plaintiff's marriage.** (emphasis added)

In Majors's third count, entitled, "Tortious Interference [with] South Carolina Ceremonial Marriage Contract," Majors incorporated therein par. 1-109 and added par. 117 that states in pertinent part:

> 117. As a direct result of Defendants' tortious interference of Plaintiff's South Carolina ceremonial marriage contract with Patricia Ferguson when Defendants filed their Divorce Petition in the Divorce Case, supra, **Plaintiff suffered** injury and damages to his reputation and emotion [*sic*] well being including **loss of consortium** with his wife Patricia Ferguson-Majors and his adopted daughter, Catherine Ferguson Majors ...." (emphasis added)

Elsewhere in the complaint, Majors complained of injuries to his marriage (par. 41, 87, 98) which were incorporated into Count 3 and complained again of loss of consortium with Ferguson (par. 125).

Featherly and Hardwick defended the D.S.C. action on the ground *inter alia* that venue was improper. The district judge erroneously concluded that Majors's injuries which occurred at his SC marital residence were not elements of his causes of action. The SC judge overlooked fact that Majors resided in Ferguson's SC home where Hardwick's libel was published. Majors did not respond when the judge asked him whether the case should be transferred to the N.D.Ga., or dismissed. At that point, Majors had effectively discontinued the SC action. Accordingly, the D.S.C. dismissed it on Aug. 29, 2000 (35a) for improper venue under Rule 12(b)(3). Consistent with discontinuance, Majors did not file a notice of appeal.

But instead, Majors planned to refile in the N.D.Ga. within the six-month period provided by the GA savings statute (GA Code Ann. 9-2-61), and commenced preparation of answers to interrogatories mandated by the N.D.Ga. upon filing of suit in that district. In his interrogatory answers Majors cited extensively to SC law. When completed, Majors filed a virtually identical complaint in the N.D.Ga. on Feb. 15, 2001, within six months of the SC dismissal and discontinuance.

In the N.D.Ga., Hardwick and Featherly again filed motions to dismiss. Hardwick attached to his motion the order of the SC district judge (34a). Hardwick filed an affidavit in support, and Majors filed counter affidavits, but the court did not convert the dismissal motions into motions for summary judgment.

On Mar. 6, 2002, N.D.Ga. Judge Cooper granted Hardwick's and Featherly's motions to dismiss under Rule 12(b), Fed.R.Civ.P. He held that "The court ... concludes that Plaintiff's Complaint and relative pleadings [Doc. No. 1-1] constitutes [*sic*] a reiteration of essentially the same issues and arguments in his state cases." (16a). The court continued:

> [1] The Federal Rules of Civil Procedure require that all claims be combined into one cause of action. [2] It appears that Plaintiff chose to litigate in multiple courts to cause increased expenses, increased hassle, and increased possibilities of having his case heard in multiple forums. [3] Plaintiff's tort action in Fulton County Superior Court should have encompassed all of his alleged claims that are

> set forth herein. [4] Plaintiff cannot maintain two separate tort actions involving the same facts, same defendants in two separate courts. [5] No matter how many ways Plaintiff can create to restate his claim the underlying actions alleged are those alleged in his state cases which have now been adjudicated. [6] The decision of the Fulton County Superior Court and Supreme Court of Georgia is res judicata to these claims. [sentences are numbered by petitioner] [17a].

Hence, the N.D.Ga. granted both motions to dismiss for *res judicata*, although Hardwick was not a party to either of the state actions. The order did not cite a single authority. Accordingly, Majors filed a timely motion for reconsideration. Judge Cooper reiterated his reasons for dismissing all claims against Featherly and specifically addressed each of Majors's claims against Hardwick in his order of Nov. 25, 2002.

Judge Cooper's Nov. 25, 2002 order repeats the above quote from his Mar. 6, 2002 order, but limits it by omitting sentence [2] ["It appears that Plaintiff chose to litigate in multiple courts to cause increased expenses, increased hassle, and increased possibilities of having his case heard in multiple forums."] (24a). Obviously sentence [2] was omitted because there was no evidence in the record to support its factual assertions; and judicial consideration of evidence is contrary to law when a court is presented with a motion to dismiss a pleading because pleadings must be construed in

favor of the pleader (Majors).[3] *Conley v. Gibson*, 355 U.S. 41 (1957).

Substantively, the Nov. 25, 2002 order did not consider the applicability of SC law; it did not advert to the *Erie* doctrine; again, it simply applied GA law. **As to Majors's loss of consortium claim** against Hardwick, the district court held: "Because the marriage and adoption took place before the Divorce Petition was filed, the court finds no evidence to support Plaintiff's claims of interference." (28a). **As to the libel claim** against Hardwick, the court held: "The [GA] statute of limitations began to run on Feb. 16, 1999, the date the Divorce Petition was filed in the Superior Court of Fulton County. Plaintiff filed the above-referenced matter on Feb. 15, 2001, approximately two years after the Divorce Petition was filed. Accordingly, Plaintiff's claim of defamation is barred by the [GA one-year] statute of limitations." (29a). **As to the intentional infliction of emotional distress claim** against Hardwick, the court held: "The [GA] abusive litigation statute provides the exclusive remedy for claims of abusive litigation. O.C.G.A. Section 51-7-85. Pursuant to [said statute], Plaintiff is precluded from filing a claim of intentional infliction of emotional distress as a remedy for abusive litigation." (29a-30a).

Majors filed a timely appeal to the 11th Cir. but the court affirmed the district court on June 18, 2003 (1a). **As to Featherly**, the court noted that the preclusive effect of a GA judgment in a subsequent

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[3] Nevertheless the 11th Cir. seized on the Mar. 6, 2002 quote, including sentence [2] in its June 18, 2003 order (5a) and eliminated sentences [4] and [5], perhaps for dramatic effect.

federal diversity action is to be determined with reference to GA law (6a). The court observed:

> In this case, it is beyond dispute that Majors's suit against Featherly and TLA ... resulted in an adjudication on the merits by a court of competent jurisdiction, i.e., a jury verdict in the Fulton County Superior Court. Accordingly, the only question is whether appellant's loss of consortium, libel and intentional infliction of emotional distress claims could have been litigated in that action. It seems plain to us that they could have been. Indeed, by appellant's own account he amended his complaint on Feb. 16, 1999 in response to Featherly's divorce petition. He could easily have used this opportunity or any subsequent amendment to advance his claims.... Under these circumstances, his current claims against Featherly are barred under the doctrine of res judicata. (7a).

As to Hardwick, the 11th Cir. applied the *Erie* doctrine noting that the correct determination would make a difference in the result because the GA limitations period for libel is different (GA has a one year prescriptive period for libel; SC two years) and the GA policy towards abusive litigation and intentional infliction of emotional distress is different (SC does not bar an intentional infliction of emotional distress claim in connection with abusive litigation, but GA does, Ga. Code Ann. 51-7-85). The court applied *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), and held that the GA choice of law rule would apply. The court concluded

that the libel action accrued with the filing in GA of the Divorce Petition and it was barred by the one-year GA prescription period. (Court did not acknowledge that CHH's letter was published in SC.) Similarly, the court held that the intentional infliction tort accrued with the filing of the Divorce Petition, was subject to GA law, and was barred by Ga. Code Ann. 51-7-85 which "expressly declares its purpose to be 'the exclusive remedy for abusive litigation.'" (11a) (The court did not consider that the emotional injury occur-red in SC.) As to consortium claim, the court stated:

> Finally, appellant correctly notes that the district court did not address his loss of consortium claim. However, this is so because Majors cannot be said to have fairly raised this claim. **Appellant did say** in the context of his "tortious interference with a South Carolina Ceremonial Marriage Contract" claim that **he suffered a loss of consortium**, but he plainly did so to specify such loss as a harm that resulted from this alleged tortious interference, not as an independent claim. **Indeed, where a litigant fails to denote a claim** in an unambiguous manner so as to notify all parties and the court as to the claim's pendency - i.e., **in a boldface heading** or by some equivalent plain notation - **that party will not be deemed to have raised the claim** in question. See generally Fed.R.Civ. P. 8(a). In this case, no fair reading of the complaint would reveal that Majors had raised an independent loss of consortium claim. Accordingly, his arguments as to the

cognizability of such a claim are unavailing. (emphasis added) (11a).

The court denied Majors's petitions for rehearing and rehearing *en banc* on Aug. 22, 2003 (31a).

REASONS TO GRANT WRIT OF *CERTIORARI*

I. CONFLICT ON APPLICATION OF STATE SAVINGS STATUTES UNDER *ERIE*

A. INTRODUCTION

To recap, *Majors v. Featherly & TLA* was filed in state court in Dec. 1998. *Featherly v. Majors* was filed in state court in Feb. 1999. *Majors v. Hardwick & Featherly* was filed in D.S.C. in Dec. 1999, and dismissed on Aug. 29, 2000,[4] and earlier discontinued by Majors. *Majors v. Hardwick & Featherly* was refiled in N.D.Ga. on Feb. 15, 2001, and dismissed in Mar. 2002, which was reiterated by substantive order of Nov. 25, 2002.

The 11th Cir. opinion of June 18, 2003, found that GA law should be applied to Majors's claims for libel and emotional distress because the only operative event was the Feb. 1999 filing of *Featherly v. Majors*.[5] The 11th Cir. held that the defendants committed both

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[4] "[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity. Under federal common law, a federal diversity judgment is to be given the same preclusive effect that would be applied by state courts in the state in which the federal diversity court sits." *Semtek Int'l,, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Thus SC law would determine the effect of the D.S.C.'s dismissal without prejudice for improper venue. The 11th Cir. never thought of this issue.

[5] To reach this result, the 11th Cir. held that Hardwick's libel to Ferguson was not included in the libel count or the emotional distress count. This type error is addressed below in Argument II.

torts in GA.[6] Although the GA statute of limitations for libel is one year (Ga. Code Ann. 9-3-33), the period would not have expired if the federal courts had applied GA's savings statute.[7]

Under *Salve Regina College v. Russell*, 499 U.S. 225 (1991), a federal appellate court is required to apply correct precepts of state law and is not to accord deference to a federal district judge's presumed expertise in local law. Therefore, the 11th Cir. erred in not applying GA's savings statute despite the district judge's failure to do so.

B. GA's SAVINGS STATUTE

Ga. Code Ann. Section 9-2-61 (*Renewal of case after dismissal.*) (Supp. 2002) provides as follows:

> (a) When any case has been **commenced in** either a state or **federal court** within the applicable statute of limitations and the plaintiff **discontinues or dismisses the same**, it may be **recommenced in** a court of this state or in a **federal court** either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of Code Section 9-11-

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[6] The 11th Cir. erred because Hardwick's libel was published in SC when Ferguson received his Mar. 24, 1999 letter. Majors's emotional distress was experienced at Ferguson's SC home shared with Majors.

[7] With respect to the emotional distress claim, the 11th Cir. held that the GA abusive litigation statute's exclusivity provision (Ga. Code Ann. 51-7-85) would extinguish the emotional distress claim.

41; provided, however, **if the dismissal or discontinuance** occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.

(b) This Code section shall not apply to contracts for the sale of goods covered by Article 2 of Title 11.

(c) The provisions of subsection (a) of this Code section granting a privilege of renewal shall apply if an action is **discontinued or dismissed without prejudice for lack of subject matter jurisdiction in** either a court of this state or a **federal court in this state.**[8] (emphasis added)

Majors commenced his D.S.C. libel action within the GA one-year statute of limitations. Ga. Code Ann. 9-3-33. Majors satisfied the conditions of the GA savings statute. First, while the **court -- not Majors -- dismissed** the action for improper venue without prejudice, **Majors discontinued** the action (a) when he failed to respond to the court whether it should dismiss the case or transfer it and (b) when he declined to appeal the incorrect decision.[9] *See Morris v. Haren*, 52 F.3d947 (11th Cir. 1995) (meaning of "discontinues" in

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[8] Query whether limiting the privilege of renewal to dismissal for lack of subject matter jurisdiction by a federal court in GA is valid under 14th Amdt. Equal protection/Privileges or Immunities; Art. IV Privileges and Immunities; or Art. I, dormant commerce clause. Rationally, such a dismissal by a federal court anywhere should permit refiling where the GA savings statute would be helpful.

[9] The D.S.C. decision to dismiss for improper venue would be incorrect under 11th Cir. precedent. *Cf. Manley v. Engram*, 755 F.2d 1463, 1466 (11th Cir. 1985), *with Akin v. PAFEC, Ltd.*, 991 F.2d 1550, 1557 (11th Cir. 1993).

GA savings statute has a separate meaning from "dismisses")

Second, since the 1985 amendment to the 1847 GA savings statute, **GA courts have repeatedly held that dismissals by state or federal courts are contemplated within the phrase in subsection (a), "the plaintiff discontinues or dismisses the [original complaint]."**[10] *See, e.g., Swartzel v. Garner*, 387 S.E.2d 359 (Ga.App. 1989) (Ga. Code Ann. 9-2-61 applies to an involuntary dismissal where the merits are not adjudicated whether dismissed by the plaintiff or by the court). Moreover, **federal courts sitting in GA have followed the construction placed by GA courts on the GA savings statute**. *See, e.g., O'Neal v. DeKalb Co.*, 667 F.Supp. 853, 859 (N.D.Ga. 1987) (Hall, J.) , *aff'd* 850 F.2d 653 (11th Cir. 1988) ("Moreover, while on its face the statute [Ga. Code Ann. 9-2-61, as amended in 1985] allows refiling only where the plaintiff dismisses the original action; the Georgia courts have repeatedly held that the action 'applies to involuntary as well as voluntary dismissals where the merits are not adjudicated.' [cite om.]").

By contrast, the 11th Cir. ignored the GA saving statute presumably because it chose to interpret the statute more narrowly than GA courts and federal courts sitting in GA. *Cf. Morris v. Haren*, 52 F.3d947 (11th Cir. 1995) (11th Cir. interpreted GA's savings statute without reference to GA cases). Such is contrary to the *Erie* doctrine. *Cf. City of Chicago v.*

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[10] In addition the D.S.C. dismissed the action for a reason akin to lack of subject matter jurisdiction under subsection (c), if the expression ("lack of subject matter jurisdiction") is a term of art and Ga. Code Ann. 9-2-61 is liberally construed.

Morales, 527 U.S. 41, 61 (1999) (federal court cannot construe state statute more narrowly than state itself has construed statute by its supreme court) (held: city street gang ordinance is unconstitutionally vague).

C. CONFLICTS.

The 11th Cir.'s refusal to interpret the GA savings statute as interpreted by GA courts - state and federal - conflicts with decisions of the 2nd Cir., 7th Cir., 8th Cir., and older 11th Cir. cases; with decisions of several district courts; and with decisions of U.S. Supreme Ct.:

2nd Circuit: *Belotto v. Ski Roundtop, Inc.*, 797 F.Supp. 315 (S.D.N.Y. 1992) (the question of what events toll a state's statute of limitations is an offshoot of the *Erie* doctrine and is of constitutional magnitude). *Smith v. Bell Sports, Inc*, 934 F.Supp. 70 (W.D.N.Y. 1996) (state savings statutes are an integral part of the state limitations law which is substantive).

7th Circuit: *Evans ex rel. Evans v. Lederle Labs.*, 167 F.3d 1106 (7th Cir. 1999) (Illinois's one-refiling rule is integral part of Illinois's savings statute; therefore, dismissal "without" prejudice after the limitations period had run barred a subsequent refiling under the federal rules). *Conover v. Lein*, 87 F.3d 905, 907 (7th Cir. 1996) (state law determines that claim is extinguished after limitations period expired; thus bar was not waived by failure timely to raise issue). *Locke v. Bonello*, 965 F.2d 534 (7th Cir. 1997). *Andrews v. Heinold Commodities, Inc.*, 771 F.2d 184, 186 (7th Cir. 1985). *Abdallah v. Slagg*, 803 F.Supp. 220 (N.D.Ill. 1992).

8th Circuit: *Beilke v. Droz*, 675 F.2d 194 (8th Cir. 1982) (original complaint filed in district 1; court dismissed it; similar complaint refiled in district 2; held: state saving statute tolled statute of limitations). *Doe v. Hartz*, 52 F.Supp.2d 1027, 1041-44 (N.D.Ia. 1999)

(original complaint filed in district; court dismissed because it lacked jurisdiction; appeal resulted in clarification of law (134 F.3d 1339) (8th Cir. 1998); similar complaint refiled in same district; held: Iowa's savings statute tolled statute of limitations).

11th Ciruit: *Turner v. Evans*, 721 F.2d 341 (11th Cir. 1983) (*per curiam*) (without discussing *Board of Regents, N.Y.U. v. Tomanio*, 446 U.S. 478 (1980), court applied GA tolling provisions).

The U.S. Supreme Court has decided three cases that suggest that the 11th Cir. erred. *Hardin v. Straub*, 490 U.S. 536 (1989) (a federal court applying a state statute of limitations to an inmate's federal civil rights action should give effect to the state's provision tolling the limitations period for prisoners). *Board of Regents, N.Y.U. v. Tomanio*, 446 U.S. 478 (1980) (respondent's 42 U.S.C. 1983 action was barred by state statute of limitations and rule that barred tolling while respondent should first pursue state remedy in state court). *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975) ("In virtually all statutes of limitations the chronological length of the limitations period is interpreted with provisions regarding tolling, revival, and questions of application.") (federal court must apply whole state package). Thus *cert.* should be granted to harmonize 11th Cir. law with that of this Court and other circuits.

II. CONFLICT ON APPLICATION OF FED. RULE 8

11th Circuit: Majors's complaint in the N.D.Ga. is 37 pages long, contains six (6) separate counts, and 150 paragraphs. The first paragraph of each count incorporates by reference the preceding paragraphs of the complaint. Incorporation by reference in pleadings

is a legitimate pleading tool in federal court. *See, e.g., Florida Dept. Ins. v. Debenture Corp.*, 921 F.Supp. 750 (M.D.Fla. 1996).

The 3rd count, entitled "Tortious Interference [with] South Carolina Ceremonial Marriage Contract," incorporates the preceding 109 paragraphs (including no. 49, *supra* at p.5), and the count runs from paragraphs 110 to 117 (paragraph no. 117, *supra* at p.6). Also incorporated are several other paragraphs specifically complaining of "loss of consortium" and harm to Majors's marriage to Ferguson. The district court did not specifically acknowledge a "loss of consortium" claim and dismissed the "Tortious Interference" claim. To circumvent the district court's not addressing the loss of consortium claim, the 11th Cir. held that the allegations are insufficient to state a claim for loss of consortium in the following language:

> Majors cannot be said to have fairly raised this claim. **Appellant did say** in the context of his "tortious interference with a South Carolina Ceremonial Marriage Contract" claim that **he suffered a loss of consortium**, but he plainly did so to specify such loss as a harm that resulted from this alleged tortious interference, not as an independent claim.[11] **Indeed, where a litigant fails to denote a claim** in an unambiguous manner so as to notify all parties and the court as to the claim's pendency – i.e., **in**

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[11] Under GA law, loss of consortium is a "derivative," not an independent claim as under SC law. Thus the 11th Cir. misconceived the issue in adjudging that Majors did not plead an "independent claim" of loss of consortium. *See* Brief of Appellant, p.18, n.4 (11th Cir. Feb. 3, 2003), for case citations.

> **a boldface heading** or by some equivalent plain notation - **that party will not be deemed to have raised the claim** in question. See generally Fed.R.Civ.P. 8(a). In this case, no fair reading of the complaint would reveal that Majors had raised an independent loss of consortium claim. Accordingly, his arguments as to the cognizability of such a claim are unavailing. (emphasis added) (11a).

This ruling is consistent with other recent (and bizarre) 11th Cir. rulings. *See, e.g., Strategic Income Fund, LLC v. Spear Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002) (Tjoflat, J.) ("shotgun complaint" is one that contains several counts each one of which incorporates by reference allegations in predecessor counts; is frowned upon) (detailed claim for violation of Securities Exchange Act of 1934 did not state claim). *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002). *Byrne v. Nezhat*, 261 F.3d 1075, 1128-34 (11th Cir. 2001) (Tjoflat, J.). *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991) (court of appeals decides for itself which incorporated allegations are material to the particular cause of action at issue). Said 11th Cir. rulings concerning the meaning of Rule 8, Fed.R.Civ.P., conflict mightily with the rulings of all other circuits:

4th Circuit: *Labram v. Havel*, 43 F.3d 918 (4th Cir. 1995) (legal labels characterizing claims cannot, standing alone, determine whether claim meets extremely modest requirement for stating claim on which relief may be granted).

5th Circuit: *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425 (5th Cir. 2000) (a complaint is

satisfactory even if fails to categorize correctly the legal theory giving rise to the claim).

6th Circuit: *Minger v. Green*, 239 F.3d 793 (6th Cir. 2001) (under Rule 8(f), a court may not rely solely on labels in a complaint, and must probe deeper and examine the substance of the complaint).

7th Circuit: *Kennedy v. National Juvenile Det. Assoc.*, 187 F.3d 690 (7th Cir. 1999) (pointing to wrong legal theory not cause for dismissal, if relief is possible under facts consistent with allegations).

9th Circuit: *Clark v. Allstate Ins. Co.*, 106 F.Supp.2d 1016 (S.D.Calif. 2000) (heightened pleading requirement of Calif. statute for allegations of malice or fraudulent intent do not apply in diversity action under *Erie R. Co. v. Tompkins* because of the doctrine of *Hanna v. Plumer*).

U.S. Supreme Court: The high court has struck down "heightened pleading requirements" imposed by courts of appeals in the last several years. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (2nd Cir.'s heightened pleading requirement for civil rights actions violates Rule 8) (the *prima facie* case that an aggrieved plaintiff must prove on summary judgment or at trial may not be imposed at the pleading stage). *Leatherman v. Tarrant Co. Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168-69 (1993) (claims against municipalities need not be detailed; and 5th Circuit's requirement is wrong) (requirement of greater specificity for particular claims is "a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."). *See also Conley v. Gibson*, 355 U.S. 41 (1957). Hence, *certiorari* is required to return the errant 11th Cir. to the fold.

III. CONFLICT ON FEDERAL CERTIFICATION OF STATE ISSUES TO STATE COURT

A. INTRODUCTION

The June 18, 2003 11th Cir. opinion is filled with errors of law.[12] Only those that qualify for a petition for writ of *certiorari* are discussed herein. That is, those that conflict clearly with other circuits.

Since 1963, the U.S. Supreme Court has itself certified state-law issues to state supreme courts for decision. *Lehman Bros. v. Schein*, 416 U.S. 386, 390, n.5 (1979) (case remanded to court of appeals to consider certification to FL supreme court). Then Justice REHNQUIST concurred stating: "State certification procedures are a very desirable means by which a federal court may ascertain an undecided point of state law, especially where, as is the case in Florida, the question can be certified directly to the court of last resort within the State. *** the Court is today for the first time expressing its view as to the use of certification procedures by the federal courts...." 416 U.S. at 394, 395.

In *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383 (1988), the Court certified both the application of a state obscenity statute to the facts of the case and the meaning of language in that statute. *See also Stewart v. Smith*, 534 U.S. 157 (2001) (convicted of murder, petitioner claimed ineffective assistance of counsel in post-judgment proceedings) (high court certified to Arizona supreme court meaning of procedural waiver of a defense under its local rule

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[12] For example, the 11th Cir. erred in applying GA law, rather than SC law, to the claims for libel, loss of consortium, and intentional infliction of emotional distress. The court missed the boat with respect to the place the claims accrued.

(akin to *habeas corpus*)); *Fiore v. White*, 528 U.S. 23 (1999) (high court certified to PA supreme Court question whether interpretation of a PA statute in a later case states correct interpretation of law at the earlier time when Fiore's conviction became final); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (case - mooted below - should have been dismissed and is remanded for dismissal) (a novel or unsettled state law question will justify certification; unique circumstances not required) (lower courts should have certified question to state supreme court before it became moot).

B. DISCUSSION.

The state law questions presented by this case in the lower federal courts are novel and unsettled. While the N.D.Ga. cannot certify a question to the GA courts and the 11th Cir. cannot certify a question to the 4th Cir. (for certification-in-turn to the SC supreme court), the 11th Cir. could have and should have certified the state-law questions to the GA supreme court. The high court should grant the writ, vacate the 11th Cir. decision, and remand to that court to certify the state-law questions to the appropriate state court. *See Bellotti v. Baird*, 428 U.S. 132 (1976) (case remanded for court of appeals to seek certification to state court as to meaning of state statute susceptible to multiple interpretations).

A novel question presented by this case is whether the 11th Cir. could, and should, certify state-law questions to the SC supreme court, which lies inside the geographical limits of the 4th Cir.

This petition now turns to the most difficult issue presented by the errors in the 11th Cir., to wit:

IV. CONFLICT ON APPLICATION OF STATE *RES JUDICATA* DOCTRINE UNDER *ERIE*

A. GA *RES JUDICATA* DOCTRINE

Ga. Code Ann. Section 9-12-40 (*Judgment conclusive between which persons and on what issues.*) (1993) provides:

> A judgment of a court of competent jurisdiction shall be conclusive between **the same parties** and their privies as to **all matters** put in issue or **which under the rules of law might have been put in issue** in the cause wherein the judgment was rendered until the judgment is reversed or set aside. (emphasis added)

1. Final Judgment Rule. For a GA judgment to be entitled to *res judicata effect*, it must be a "final judgment." Under GA law, a jury verdict is not a final judgment. To become a final judgment, the trial judge presiding at the trial must approve the verdict by means of a judgment under his hand. Only after approval does the "verdict" become final. *Head v. CSX Transp., Inc.*, 524 S.E.2d 215 (Ga. 1999). *Cf. Miner v. Harrison*, 422 S.E.2d 899 (Ga.App. 1992) (until judgment rendered on jury verdict, there can be no appeal); *Rash v. Rash*, 173 F.3d 1376 (11th Cir. 1999) (whether state judgment possesses the necessary finality to be entitled to Full Faith and Credit is determined by the state law of rendition). The 11th Cir.'s non-argument decision overlooked these decisions and others brought to its attention and focused solely on whether Majors should have supplemented his state complaint under state law, Ga. Code Ann. 9-11-15(d).

2. Matters That Might Have Been Put in Issue. To recap the facts: *Majors v. Featherly & TLA* is a state shareholder's lawsuit against the only other shareholder and the corporation to dissolve the corporation, filed Dec. 23, 1998. *Featherly v. Majors* is a state divorce action that was brought in Feb. 1999, and terminated in Majors's favor in Sept. 1999. While Majors elected to amend his complaint in the shareholder's suit, he chose not to supplement the complaint in that **business** lawsuit to allege **personal** torts against Featherly for the baseless divorce action. (Rather, Majors chose to file a separate lawsuit in the D.S.C. in Dec. 1999 (and in the N.D.Ga. in Feb. 2001), against Featherly and her attorney Hardwick.) Majors is the plaintiff in both the state shareholder's action and the federal actions for personal injuries. Featherly is a defendant in both the state and federal actions. Hardwick is not a defendant in the shareholder's action, and Majors could not have asserted claims for personal injuries against him; a separate lawsuit was necessary. Thus the GA statute's requirement of "**the same parties**" is clearly satisfied as to Majors and Featherly. Thus the next question is whether Majors's **personal** claims against Featherly are "**matters ... which under the rules of law might have been put in issue in the cause wherein the judgment was rendered.**" (emphasis added)

B. RULE 15(d) UNDER GA, FEDERAL LAW

Ga. Code Ann. Section 9-11-15 (*Amended and supplemental pleadings.*) (1993) provides in subsec. (d):

> (d) *Supplemental pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit **him** to serve

> a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. (emphasis added)

Fed.R.Civ.P. 15 (*Amended and Supplemental Pleadings*) (U.S.C.A.) provides in subsec. (d) as follows:

> **(d) Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit **the party** to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefore. (emphasis added)

A comparison of the two provisions discloses that they are identical, with one word different, an immaterial difference. Obviously, Ga. Code Ann. 9-11-15(d) was based on Rule 15(d), Fed.R.Civ.P. Indeed the entire GA Civil Practice Act is based on the Fed.R.Civ.P. *See, e.g., Bicknell v. CBT Factors Corp.*, 321

S.E.2d 383, 385 (Ga.App. 1984). GA courts have consistently followed federal decisions on the interpretation of the scope of the cognate provision of the Civil Practice Act. Even federal courts in GA have interpreted the Fed.R.Civ.P. by reference to GA decisions on the Civil Practice Act. The 11th Cir. decision on the applicability of the GA supplemental pleading statute may have a precedential effect on the applicability of Federal Rule 15(d). Therefore, the *Hanna v. Plumer* corollary to *Erie* doctrine is suggested.

C. *ERIE* DOCTRINE

Erie v. Tompkins, 304 U.S. 64 (1938), teaches that in a case where jurisdiction is founded on diversity of citizenship a federal court must apply state substantive law to the facts of the case. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940), requires a federal diversity court to apply intermediate state appellate cases unless the federal court could clearly predict that the highest state court would not apply those decisions. *Hanna v. Plumer*, 380 U.S. 460 (1965), instructs that in a diversity case a federal court must apply federal procedural law to the facts of the case where that law expresses an important federal interest. The Federal Rules are presumed to express important federal interests. This petition presents a case that tests the applicability of *Stoner* and *Hanna* where *Erie* applies.

The question is: Are Majors's **personal** claims against Featherly for libel, loss of consortium, and infliction of distress barred by his decision not to supplement his state **shareholder's action** to dissolve a corporation with said claims for **personal** injuries where the state procedural statute (Ga. Code Ann. 9-11-15(d)) is virtually the same as the federal rule (Rule 15(d), Fed.R.Civ.P.)?

The federal law on supplementing a complaint is clear and was authoritatively espoused by the 11th Circuit in *Manning v. City of Albany*, 953 F.2d 1355 (11th Cir. 1992) (district court's dismissal of suit on *res judicata* and collateral estoppel grounds is reversed) (claims that "could have been brought" are claims in existence at time original complaint is filed or claims actually asserted by supplemental pleadings or otherwise in earlier action) (existence of doctrine of *res judicata* does not make mandatory the filing of supplements under Rule 15(d), Fed.R.Civ.P.). *Cf. Akin v. PAFEC, Ltd.*, 991 F.2d 1550 (11th Cir. 1993) (plaintiff's claims were not compulsory counterclaims in prior state court action because they did not accrue until the prior action ended, and thus were not barred by *res judicata*).

Thus, Federal Rule 15(d) does not require a complainant to move to supplement his complaint with claims that arise after the filing of the complaint. The rule does not require a federal court to grant a motion to supplement a complaint. Rather, Rule 15(d) gives (a) the pleader the discretion to petition to supplement and (b) the federal court the discretion to authorize the supplement.

On the other hand, the 11th Circuit in its non-argument decision made several mistakes under *Erie*. First, the federal appellate court made the mistake of (mis)applying an inapposite state intermediate appellate decision, *CenTrust Mortgage Corp. v. Smith & Jenkins, P.C.*, 469 S.E.2d 466 (Ga.App. 1996), which is clearly distinguishable.[13] But more seriously and

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[13] There was only one subject matter, namely, a botched real estate closing giving rise to one professional malpractice claim. The original complaint alleged that the lender's attorneys overlooked

relevant to this *cert.* petition is that the 11th Cir. applied a state intermediate appellate court decision at variance with state supreme court precedent in violation of *Stoner. See also Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 903 (6th Cir. 2002); *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383, 1387 (11th Cir. 1988).

Those GA supreme court cases are, *e.g., Lawson v. Watkins,* 401 S.E.2d 719 (Ga. 1991) (plaintiff sued for repayment of loans; defendant counterclaimed to enjoin foreclosure of racetrack he pledged to secure payment; plaintiff obtained judgment; plaintiff sued second time to determine who owned racetrack; held: second suit was not *res judicata* as subject matter was entirely different); *Rose v. Chandler,* 279 S.E.2d 423 (Ga. 1981) (in first suit plaintiff sued for declaration whether lease's indefinite duration violated rule against perpetuities; held: no; in second suit, plaintiff sued for declaration whether option clause within adjudicated

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the borrower's bankruptcy filing before closing the loan. The lender sued the attorneys for professional negligence but did not file an expert affidavit attesting to the malpractice as required by Ga. Code Ann. 9-11-9.1. The trial court dismissed the claim with leave to amend. The lender amended the complaint by attempting to delete the malpractice claim and to maintain an action on the basis of simple negligence. The defendant attorneys moved to dismiss the amended complaint; and while the motion was pending, the lenders learned that in connection with the transaction the attorneys had altered a deed from the borrower's wife to the borrower. However, the lender did not move to "amend" the complaint for the fraud. The trial court dismissed the malpractice claim with prejudice. The lender filed an application for discretionary appeal, and the GA Court of Appeals denied the application. The lender then filed a second lawsuit against the attorneys for fraud based on alteration of the deed. The trial court dismissed the second suit on *res judicata* grounds. The lender appealed. The Court of Appeals of Georgia affirmed.

lease violated rule against perpetuities; held: *res judicata* not applicable and answer is no); *Department of Agriculture v. Country Lad Foods, Inc.*, 177 S.E.2d 38 (Ga. 1970) (plaintiff filed amended complaint after state government amended regulations that were attacked in original complaint; held: while plaintiff would have been better advised to file separate lawsuit, court will address amended complaint).

The 11th Cir. also overlooked other GA state intermediate appellate court decisions that substantially differ from inapposite case chosen by non-argument panel. *See, e.g., Whitley Const. Co. v. Whitley*, 213 S.E.2d 909, 911 (Ga.App. 1975); *Stringer v. Bugg*, 563 S.E.2d 447 (Ga.App. 2002); *Poole v. Estfan*, 426 S.E.2d 61 (Ga.App. 1992); *Stiltjes v. Ridco Exterm. Co.*, 399 S.E.2d 708 (Ga.App. 1990), *aff'd* 409 S.E.2d 847 (Ga. 1991); *Leonard v. Easley*, 359 S.E.2d 433 (Ga.App. 1987); *Pace v. Merck*, 256 S.E.2d 73 (Ga.App. 1979).

Second, the 11th Cir. presumed to tell Majors how to plead in state court. This stands *Erie* on its head. Then the 11th Cir. presumed to tell Majors to supplement his state court complaint (under Ga. Code Ann. 9-11-15(d)), when the identical federal pleading rule (Rule 15(d), Fed.R.Civ.P.) would not require Majors to supplement in federal court. This is effrontery, not to speak of arbitrariness and caprice.

D. CONFLICTS

The 11th Circuit violated *Stoner v. New York Life Ins. Co.* and *Hanna v. Plumer* in applying an inapposite state intermediate appellate decision in light of the federal interest in correct pleading of after-acquired claims. Indeed, other circuits would follow an analogous federal decision over an inapposite state intermediate appellate decision.

CONCLUSION

The 11th Circuit does not follow Supreme Court precedent when the appellate court thinks it can improve on the applicable rule. *See, e.g., Byrne v. Nezhat, supra,* and *Strategic Income Fund, LLC v. Spear Leeds & Kellogg Corp., supra.* But, the Supreme Court has directed the appellate courts to follow Supreme Court precedent and let the high court determine whether to change the rule of law. *Leatherman v. Tarrant Co. Narcotics Intell. & Coord. Unit,* 507 U.S. 163, 168 (1993) (requirement of greater specificity for particular claims is "a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."). The 11th Circuit has not adopted this suggestion and imperils the rule of law throughout the nation, not just in that circuit. Therefore, this court should grant the writ of *certiorari*, "GVR" the 11th Circuit decision, and determine to which state court certification should be directed.

This 17 day of Nov., 2003.

Respectfully submitted,

NED B. MAJORS

Filed: June 18, 2003
[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16930
Non-Argument Calendar

D.C. Docket No. 01-00447-CV-CC-1

NED B. MAJORS,

Plaintiff-Appellant,

versus

CLIFFORD H. HARDWICK,
LYNN G. FEATHERLY et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia,

(June 18, 2003)

Before CARNES, MARCUS and WILSON, Circuit Judges.

PER CURIAM: [page 2]

Ned B. Majors appeals the district court's dismissal of his complaint pursuant to Fed.R.Civ.P.

12(b)(6).[1] On appeal, Majors claims that the district court erred by dismissing his claims sounding in loss of consortium, libel and intentional infliction of emotional distress.

We review de novo the dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6). Next Century Communications Corp. v. Ellis, 318 F.3d 1023, 1025 (11th Cir. 2003); Harris v. Ivax Corp., 182 F.3d 799, 802 (11th Cir. 1999). The plaintiff's factual allegations are accepted as true. South Fla. Water Mgm't Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996). Dismissal is not appropriate unless it is plain that the plaintiff can prove no set of facts that would support the claims in the complaint. See id. However, conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal. See id. at 408 n.10.

Upon thorough review of the record and the parties' briefs, we find no reversible error and affirm.

This action is one of several related lawsuits involving Majors (an attorney admitted to the Georgia bar), his former business partner and paramour Lynn G. Featherly and her retained counsel, Clifford H. Hardwick. Appellant and Featherly [page 3] jointly owned Tax Lien Acquisitions, Inc. ("TLA"), a Georgia corporation that was incorporated in 1992. In October 1997, Majors met Patricia Ferguson, a South Carolina attorney, and they married on March 7, 1998.

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[1] Although the district court did not specify the subsection of Rule 12(b) pursuant to which it was acting, we construe its dismissal of appellant's claims as having been based on Fed.R.Civ.P. 12(b)(6).

Following the wedding appellant moved into Ferguson's home in South Carolina.

Following his marriage to Ferguson, Majors's business relationship with Featherly deteriorated. In particular, appellant says that Featherly was embezzling TLA funds, and on December 23, 1998 he filed a lawsuit sounding in breach of fiduciary duty against her and TLA in Fulton County Superior Court. Featherly was represented by Hardwick in this action, and in January, 1999 she filed an answer and counterclaims. The case proceeded to trial, and on January 17, 2002, a jury found for Featherly on appellant's claims and for Majors on Featherly's counterclaims – in short, the jury awarded no money to either party.

On February 16, 1999, during the pendency of Majors's breach of fiduciary duty suit, in what appellant labels a hardball defense strategy, Featherly filed a petition for divorce against Majors in the Fulton County Superior Court on the theory that she and appellant had been parties to a common law marriage. This same day, Majors responded to this "escalation" of the breach of fiduciary duty litigation by amending his complaint in the case against Featherly and TLA to include claims against Featherly for embezzlement and fraud. Appellant alleges that on March 24, [page 4] 1999, Hardwick wrote to Ferguson regarding the divorce suit. Majors says that this greatly upset Ferguson, as the allegations of a common law marriage between Majors and Featherly, if true, would have rendered appellant an adulterer and his marriage to Ferguson bigamous. Majors filed a motion for summary judgment in the divorce suit on the ground that he and Featherly never were married, and

although the court initially denied this motion, it subsequently granted a motion for reconsideration on August 2, 1999 based on Featherly's own statements in 1995 and 1996 that she never had been married.

Subsequently, on December 4, 1999, Majors filed in the United States District Court for the District of South Carolina a complaint that he labels "virtually identical" to the one he filed in this case. However, on August 29, 2000, the court dismissed that action pursuant to 28 U.S.C. Section 1406(a) for improper venue. On February 23 [*sic*], 2001 appellant filed the instant complaint against Featherly, Hardwick and "The Clifford H. Hardwick & Lynn G. Featherly Partnership"[2] in the United States District Court for the Northern District of Georgia. He advanced several claims based on the filing of the divorce action by Hardwick on behalf of Featherly. Specifically, appellant's claims sounded in civil conspiracy; malicious prosecution with ulterior [page 5] motive; tortious interference with a South Carolina ceremonial marriage contract; tortious interference with property; and intentional infliction of emotional distress. In lieu of an answer, Hardwick and Featherly moved to dismiss each of these claims based on (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) res judicata; (4) statute of limitations; (5) insufficiency of service of process; and (6) failure to state a claim. The "Clifford H. Hardwick & Lynn G. Featherly Partnership" did not respond to the complaint because,

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[2] Appellant alleges that Hardwick formed a "secret partnership" with Featherly in which Hardwick provided Featherly with legal services in exchange for TLA assets.

accordingly to Hardwick, no such partnership existed or ever had existed, and that the only relationship between he [*sic*] and Featherly was that of attorney and client.

The district court concluded that Majors's complaint "constitute[d] a reiteration of essentially the same issues and arguments in his state cases," and accordingly granted appellees' motions to dismiss. In particular, the court held that:

> The Federal Rues of Civil Procedure require that all claims be combined into one cause of action. It appears that Plaintiff chose to litigate in multiple courts to cause increased expenses, increased hassle, and increased possibilities of having his case heard in multiple forums.... [*sic*] No matter how many ways Plaintiff can create to restate his claim the underlying actions alleged are those alleged in his state cases which have now been adjudicated. The decision of the Fulton County Superior Court and Supreme Court of Georgia is res judicata to these claims.

Majors moved for reconsideration, and in denying this motion the district court further explicated its rationale for dismissing each of appellant's claims with respect [page 6] to Hardwick, who was not a party to either Majors's initial action against Featherly and TLA or the divorce proceeding brought by Featherly. The district court examined appellant's claims seriatim and explained why, setting aside the doctrine of claim preclusion, each was incognizable as a matter of law. On appeal, Majors contests only the dismissal of his

loss of consortium, libel and intentional infliction of emotional distress claims.

For the sake of analytical clarity, we will first consider the propriety of the district court's judgment of dismissal as concerns Featherly and then as it relates to Hardwick.

Appellant's Claims Against Featherly

Preliminarily, we note that the preclusive effect of a state court judgment in a subsequent federal diversity action is to be determined with reference to the law of the rendering state. See Montgomery Ward Dev. Corp. v. Juster, 932 F.2d 1378, 1380 (11th Cir. 1991); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1509 (11th Cir. 1985) ("Where the first suit is brought in state court and the second suit is brought in federal court based on diversity, state law of res judicata is to be applied.") (citations omitted). Under Georgia law, "[a] judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all [page 7] matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside." Ga. Code Section 9-12-40. As the Georgia Supreme Court has explained, "[t]he doctrine of res judicata prevents re-litigation of matters that were or could have been litigated in a previously adjudicated action. In order for res judicata to bar a subsequent action, it must be established that an identity of parties and subject matter exists between the two actions, and that a court of competent jurisdiction entered an adjudication in the earlier action." Labovitz v. Hopkinson, 519 S.E.2d 672, 675 (Ga. 1999) (citations omitted).

In this case, it is beyond dispute that Majors's suit against Featherly and TLA was an action between the same parties (i.e., Majors and Featherly) and that it resulted in an adjudication on the merits by a court of competent jurisdiction, i.e., a jury verdict in the Fulton County Superior Court. Accordingly, the only question is whether appellant's loss of consortium, libel and intentional infliction of emotional distress claims could have been litigated in that action. It seems plain to us that they could have been. Indeed, by appellant's own account he amended his complaint on February 16, 1999 in response to Featherly's divorce petition. He could easily have used this opportunity or any subsequent amendment to advance his claims for intentional infliction of emotional distress, loss of consortium and libel. Under these [page 8] circumstances, his current claims against Featherly are barred under the doctrine of res judicata.

The Georgia Court of Appeals addressed a factually similar scenario in CenTrust Mortgage Corp. v. Simth [*sic*] & Jenkins, P.C. In that case, the party against which res judicata was invoked argued that its claim concerning an altered deed could not have been brought in an earlier action between the same parties because it did not learn of the alteration until after the previous action had been filed. Compare Appellant's Brief at 20 (arguing against the applicability of res judicata on the ground that the loss of consortium claim "did not arise ... until after Majors had filed and served Majors v. Featherly & TLA"). The Court of Appeals rejected this argument, reasoning that:

> Even assuming, as CenTrust alleges, that Smith & Jenkins initially concealed that the deed had been altered, CenTrust could have easily amended its complaint in December 1994 upon learning of the alteration. Instead CenTrust chose to wait several months to pursue this claim. Clearly, CenTrust had the opportunity to pursue any claim concerning the altered deed earlier in the litigation, it simply chose not to. Consequently, CenTrust cannot now complain that it had no prior opportunity to litigate the issue.

469 S.E.2d 466, 468-69 (Ga.Ct.App. 1996). This reasoning is equally applicable in the case currently at bar, and is fatal to the cognizability of Majors's present claims against Featherly. [page 9]

Appellant's Claims Against Hardwick

Because Hardwick was not a party to Majors's state court action against Featherly and TLA, appellant's loss of consortium, libel and intentional infliction of emotional distress claims are not barred by claim preclusion as against him. As alternative bases for dismissing these claims, the district court held that (1) appellant's defamation claim was barred under Georgia's 1 year statute of limitations; and (2) his intentional infliction of emotional distress claim was based on the filing of an abusive lawsuit, for which Georgia's abusive litigation statute was the exclusive remedy. The court did not address appellant's loss of consortium claim.

In evaluating these claims as applied to Hardwick, we must first determine whether the district court correctly applied Georgia law or whether appellant is correct that his claims are governed by South Carolina law. This is a distinction that makes a difference in the context of Majors's libel claim. Whereas under Georgia law defamation actions are subject to a one year limitations period, see Davis v. Hosp. Auth., 269 S.E.2d 867, 870 (Ga.Ct.App. 1980), under South Carolina law "[t]here is a two year statute of limitations for libel and slander causes of action." Jones v. City of Folly Beach, 483 S.E.2d 770, 774 (S.C.Ct.App. 1997) (citing S.C. Code Ann. Section 15-3-550 (Supp. 1995)). Similarly, whereas Georgia law does not recognize an intentional infliction of emotional distress claim based on the malicious filing of a [page 10] lawsuit, see Georgia Code Section 51-7-85, the parties have not directed us - nor have we found - any such bar under South Carolina law.

The district court was obligated to apply Georgia choice of law rules. See Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). In tort cases, Georgia courts apply the traditional rule of lex loci delectis. See International Bus. Machs. Corp. v. Kemp, 536 S.E.2d 303, 306 (Ga.Ct.App. 2000). Under this rule, "tort cases are generally governed by the substantive law of the place where the tort or wrong occurred. In torts of a transitory nature, the place of the wrong is the place where the last event occurred necessary to make an actor liable for the alleged tort." Id. (citations omitted).

In this case, Majors's defamation claim plainly was based on the filing of the divorce petition in the

Superior Court of Fulton County.[3] See Complaint Par. 127 ("Defendants, by filing their Divorce Petition ... falsely accused Plaintiff of the commission of the crime of Bigamy ...."). This filing obviously occurred in Georgia, and as such it is governed by the substantive law of Georgia, which for choice of law purposes includes statutes of limitations. See Sun Oil Co. v. Wortman, 486 U.S. 717, 726, 108 S.Ct. 2117, 2124, 100 L.Ed.2d 743 (1988) (discussing "the [page 11] area of choice of law for purposes of federal diversity jurisdiction, where we have held that statutes of limitations are substantive" (citing Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945)). As stated, Georgia law features a one year limitations period for defamation claims. Here, the divorce petition was filed on February 16, 1999, while the complaint in this action was not filed until February 15, 2001. Accordingly, it was untimely under Georgia law and the district court did not err by dismissing this claim as to Hardwick.

Majors's intentional infliction of emotional distress claim similarly was based only on the filing of the divorce petition. Indeed, this particular undertaking is mentioned 3 times in the context of this claim, see Complaint Par. 144-46, while the letter to Ferguson is not deemed a basis for the claim at all. Because this claim also was based entirely on the filing of a lawsuit in Georgia, the district court did not err in applying Georgia law to this claim either. Moreover, the district court correctly recognized that Georgia

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[3] Indeed, contrary to appellant's argument that this claim is based on Hardwick's letter to Ferguson, the claim makes no mention of the Hardwick letter.

Code Section 51-7-85 expressly declares its provisions to be "the exclusive remedy for abusive litigation." As such, the court did not err in concluding that appellant's intentional infliction of emotional distress claim is not cognizable.

Finally, appellant correctly notes that the district court did not address his loss of consortium claim. However, this is so because Majors cannot be said to have fairly raised this claim. Appellant did say in the context of his "tortious interference with [page 12] a South Carolina Ceremonial Marriage Contract" claim that he suffered a loss of consortium, but he plainly did so to specify such loss as a harm that resulted from this alleged tortious interference, not as an independent claim. Indeed, where a litigant fails to denote a claim in an unambiguous manner so as to notify all parties and the court as to the claim's pendency - i.e., in a boldface heading or by some equivalent plain notation - that party will not be deemed to have raised the claim in question. See generally Fed.R.Civ.P. 8(a). In this case, no fair reading of the complaint would reveal that Majors had raised an independent loss of consortium claim. Accordingly, his arguments as to the cognizability of such a claim are unavailing.

Finally, Majors has presented no argument that calls into question the correctness of the district court's conclusion that "The Clifford H. Hardwick & Lynn G. Featherly Partnership" is a non-entity. Accordingly, the district court did not err insofar as it dismissed appellant's claims against this party.

Because none of Majors's claims are meritorious, we affirm the district court's judgment of dismissal in all respects.

AFFIRMED.

Filed: March 6, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NED B. MAJORS,	:	
Plaintiff,	:	CIVIL ACTION NO.
vs.	:	
	:	1:01-CV-447-CC
CLIFFORD H. HARDWICK,	:	
LYNN G. FEATHERLY, and	:	
THE CLIFFORD H. HARD-	:	
WICK & LYNN G. FEATH-	:	
ERLY PARTNERSHIP,	:	
Defendants.	:	

ORDER

Pending before the Court in the above-referenced case are the following motions:

1. Defendant Clifford H. Hardwick's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b) [Doc. No. 7-1];
2. Defendant Lynn G. Featherly's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b) [Doc. No. 8-1];
3. Defendant Clifford H. Hardwick's Motion to Strike [Doc. No. 10-1] and for Sanctions [Doc. No. 10-2];
4. Defendant Clifford H. Hardwick's Motion for Rule 11 Sanctions Against Ned B. Majors [Doc. No. 11-1];
5. Defendant Clifford H. Hardwick's Motion for Restraining Order Against Ned B. Majors [Doc. No. 13-1];

6. Plaintiff's Request for Extension to Respond to Defendant Featherly's 12(b) Motion Until at Least 10 Days After Receiving a Copy of the Motion; [page 2]
7. Plaintiff's Request for Court to Direct Service Upon Defendant Clifford H. Hardwick, Individually, and Defendant Clifford H. Hardwick, Partner of the Clifford Hardwick & Lynn Featherly Partnership, Be Effected by a United States Marshall, Deputy United States Marshall, or Other Person Appointed by the Court for that Purpose [Doc. No. 21-1]; and
8. Defendant Clifford H. Hardwick's Second Motion for Rule 11 Sanctions Against Ned B. Majors [Doc. No. 25-1].

Background

Plaintiff and pro se Defendant Lynn G. Featherly ("Featherly") jointly owned Tax Lien Acquisitions, Inc. ("TLA"), a corporation organized under the laws of Georgia. Plaintiff was TLA's chief executive officer and Featherly was the corporation's president and chief financial officer. At the time of TLA's creation, Plaintiff and Featherly resided together in Georgia. The personal relationship between Plaintiff and Featherly deteriorated. Eventually, Plaintiff met and married Patricia Ferguson, a licensed South Carolina attorney, and moved from Georgia to South Carolina.

On December 23, 1998, Plaintiff filed suit against Featherly and TLA in the Fulton County Superior Court of Georgia (Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action No. 1998 CV 03450) alleging that Featherly had breached her fiduciary duties to Plaintiff and TLA. According to Plaintiff, he filed suit in Georgia since all of Featherly's

allegedly tortious acts against TLA and Plaintiff, up to that time, had been committed in Georgia. On January 17, 2002, the jury entered a verdict and found for Featherly as to Plaintiff's claims and for Plaintiff as to Featherly's claims. Neither party was [page 3] awarded any money.

Featherly sought legal representation in the above-referenced case from Defendant Clifford H. Hardwick ("Hardwick"), a duly licensed Georgia attorney with his principal place of business in Georgia. Plaintiff alleges that Featherly and Hardwick then formed a "secret partnership" whereby they conspired to assert that Plaintiff and Featherly had entered into a common law marriage as a result of their living together in Georgia. This "secret partnership," according to Plaintiff, would allegedly benefit Featherly by providing her with legal representation and benefit Hardwick by enabling him to receive TLA assets. Plaintiff admits that Featherly and Hardwick are residents of the state of Georgia and have been at all times relevant to the instant actions before this district court.

On February 16, 1999, Featherly filed a petition for divorce against Plaintiff in the Fulton County Superior Court of Georgia (Lynn G. Featherly v. Ned B. Majors, Civil Action No. 1999 CV 05182). Hardwick represented Featherly in this matter. Plaintiff filed a motion for summary judgment in the divorce case, and the motion initially was denied. Upon a motion for reconsideration, Judge Cynthia Wright set aside her prior decision and granted summary judgment in favor of the Plaintiff after learning that Featherly had previously testified, on other non-related cases, that she had never been married. Plaintiff then filed a

motion in Georgia state court to recover attorney's fees and costs for abusive litigation. After the trial court denied Plaintiff's motion, Plaintiff appealed to the Georgia Court of Appeals. The Court of Appeals transferred the case to the Georgia Supreme Court. The Supreme Court denied Plaintiff's appeal. Plaintiff filed a motion for reconsideration, but that motion was also denied by the Georgia Supreme Court. [page 4]

Procedural History

The pro se Plaintiff, Ned B. Majors ("Plaintiff"), who is an attorney admitted to the Georgia State Bar, filed the instant Complaint [Doc. No. 1-1] on February 23 [*sic*], 2001, alleging multiple torts committed by the Defendants. Specifically, Plaintiff alleges causes of action for: civil conspiracy; malicious prosecution with ulterior motive; tortious interference of a South Carolina ceremonial marriage contract; tortious interference of a South Carolina step-parent adoption; defamation of character; tortious interference with property; and intentional infliction of emotional distress by citizens and residents of the State of Georgia against a citizen and resident of the State of South Carolina.

In response thereto, Hardwick, who is an attorney admitted to the State Bar of Georgia, filed a Motion to Dismiss [Doc. No. 7-1] all of Plaintiff's claims on March 22, 2001, based upon alleged lack of subject matter jurisdiction, lack of personal jurisdiction, res judicata, statute of limitations, insufficiency of service and failure to state a claim upon which relief can be granted. Featherly also filed a Motion to Dismiss [Doc. No. 8-1], based upon the same grounds as those enunciated by Hardwick. No appearance has been

made by the alleged Clifford H. Hardwick & Lynn G. Featherly Partnership, since according to defendant Hardwick:

> There is no such partnership and never has been. This is purely a creation of the Plaintiff as part of his false and frivolous lawsuit. The only relationship between Featherly and Hardwick is that of client and attorney.

Def. Supp. Brief 12-13.

Plaintiff has responded to each of these motions. [page 5]

Motion to Dismiss

Defendants Featherly and Hardwick move this court for an order pursuant to Fed.R.Civ.P. 12(b) dismissing Plaintiff's Complaint [Doc. No. 1-1]. The court has conducted a careful review of the parties' respective pleadings and concludes that Plaintiff's Complaint and relative pleadings [Doc. No. 1-1] constitutes a reiteration of essentially the same issues and arguments in his state cases.

Plaintiff's Complaint alleges causes of action arising out of the civil suit filed on December 23, 1998, against Featherly and TLA in the Fulton County Superior Court of Georgia (Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action No. 1998 CV 03450) and the divorce petition (Lynn G. Featherly v. Ned B. Majors, Civil Action No. 1999 CV 05182) filed on February 16, 1999.

The matter of Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action No. 1998 CV 03450 was recently resolved by a jury

verdict in Fulton County Superior Court. On January 17, 2002, the jury entered a verdict and found for Featherly as to Plaintiff's claims and for Plaintiff as to Featherly's claims. Neither party was awarded any money.

The Federal Rules of Civil Procedure require that all claims be combined into one cause of action. It appears that Plaintiff chose to litigate in multiple courts to cause increased expenses, increased hassle, and increased possibilities of having his case heard in multiple forums. Plaintiff's tort action in Fulton County Superior Court should have encompassed all of his alleged claims that are set forth herein. Plaintiff cannot maintain two separate tort actions involving the same facts, same defendants in two separate courts. No [page 6] matter how many ways Plaintiff can create to restate his claim the underlying actions alleged are those alleged in his state cases which have now been adjudicated. The decision of the Fulton County Superior Court and Supreme Court of Georgia is res judicata to these claims.

Accordingly, Defendants Motion to Dismiss [Doc. Nos. 7-1 and 8-1] are hereby **GRANTED**. Lastly, all other pending motions before this court [Doc. Nos. 10-1, 10-2, 11-1, 13-1, 21-1 and 25-1] are now **MOOT** and hereby **DENIED** on that basis.

SO ORDERED this 6th day of March, 2002.

/s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

Filed: March 20, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NED B. MAJORS,	:	
Plaintiff,	:	CIVIL ACTION FILE
vs.	:	
	:	NO. 1:01-cv-447-CC
CLIFFORD HARDWICK,	:	
LYNN FEATHERLY &	:	
THE CLIFFORD H. HARD-	:	
WICK & LYNN G. FEATH-	:	
ERLY PARTNERSHIP,	:	
Defendants.	:	

JUDGMENT

This action having come before the court, Honorable Clarence Cooper, United States District Judge, for consideration of defendants' motions to dismiss, and the court having granted said motions, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover its [*sic*] costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 20th day of March, 2002.

LUTHER D. THOMAS
CLERK OF COURT
By: /s/ Sonya Coggins
Deputy Clerk

Filed: Nov. 25, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NED B. MAJORS, Plaintiff,	:	CIVIL ACTION NO.
vs.	:	1:01-CV-447-CC
CLIFFORD H. HARDWICK, LYNN G. FEATHERLY, and THE CLIFFORD H. HARDWICK & LYNN G. FEATHERLY PARTNERSHIP, Defendants.	:	

ORDER

Pending before the Court is Plaintiff Ned B. Majors' ("Plaintiff") Motion for Reconsideration [Doc. No. 29-1]. Plaintiff filed a Motion for Reconsideration [Doc. No. 29-2] requesting this Court to reconsider its March 7, 2002 Order [Doc. No. 28-1] granting Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff and pro se Defendant Lynn G. Featherly ("Featherly") jointly owned Tax Lien Acquisition, Inc. ("TLA"), a corporation organized under the laws of Georgia. Plaintiff was TLA's chief executive officer and Featherly was the corporation's president and chief financial officer. At the time of TLA's creation, Plaintiff and Featherly resided together in Georgia. The personal relationship between Plaintiff

and Featherly deteriorated. Eventually, Plaintiff met and married Patricia Ferguson, a licensed South Carolina attorney, and moved from Georgia to South Carolina.

On December 23, 1998, Plaintiff filed suit against Featherly and TLA in the Fulton County Superior Court of Georgia (Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action No. 1998 CV 03450) alleging that [page 2] Featherly had breached her fiduciary duties to Plaintiff and TLA. According to Plaintiff, he filed suit in Georgia since all of Featherly's allegedly tortious acts against TLA and Plaintiff, up to that time, had been committed in Georgia. On January 17, 2002, the jury entered a verdict and found for Featherly as to Plaintiff's claims and for Plaintiff as to Featherly's claims. Neither party was awarded any money.

Featherly sought legal representation in the above-referenced case from Defendant Clifford H. Hardwick ("Hardwick"), a duly licensed Georgia attorney with his principal place of business in Georgia. Plaintiff alleges that Featherly and Hardwick then formed a "secret partnership" whereby they conspired to assert that Plaintiff and Featherly had entered into a common law marriage as a result of their living together in Georgia. This "secret partnership," according to Plaintiff, would allegedly benefit Featherly by providing her with legal representation and benefit Hardwick by enabling him to receive TLA assets. Plaintiff admits that Featherly and Hardwick are residents of the state of Georgia and have been at all times relevant to the instant actions before this district court.

On February 16, 1999, Featherly filed a petition for divorce against Plaintiff is the Fulton County Superior Court of Georgia (Lynn G. Featherly v. Ned B. Majors, Civil Action No. 1999 CV 05182). Hardwick represented Featherly in this matter. Plaintiff filed a motion for summary judgment in the divorce case, and the motion initially was denied. Upon a motion for reconsideration, Judge Cynthia Wright set aside her prior decision and granted summary judgment in favor of the Plaintiff after learning that Featherly had previously testified, on other non-related cases, that she had never been married. Plaintiff then filed a motion in Georgia state court to recover attorney's fees and costs for abusive litigation. After the trial court denied Plaintiff's motion, Plaintiff appealed to the Georgia Court of Appeals. The Court of Appeals transferred the case to the Georgia Supreme Court. The Supreme Court denied Plaintiff's appeal. Plaintiff [page 3] filed a motion for reconsideration, but that motion was also denied by the Georgia Supreme Court.

II. PROCEDURAL HISTORY

The pro se Plaintiff, Ned B. Majors ("Plaintiff"), who is an attorney admitted to the Georgia State Bar, filed the instant Complaint [Doc. No. 1-1] on February 23 [*sic*], 2001, alleging multiple torts committed by the Defendants. Specifically, Plaintiff alleges causes of action for: civil conspiracy; malicious prosecution with ulterior motive; tortious interference of a South Carolina ceremonial marriage contract; tortious interference of a South Carolina step-parent adoption; defamation of character; tortious interference with property; and intentional infliction of emotional distress by citizens and residents of the State of

Georgia against a citizen and resident of the State of South Carolina.

In response thereto, Hardwick, who is an attorney admitted to the State Bar of Georgia, filed a Motion to Dismiss [Doc. No. 7-1] all of Plaintiff's claims on March 22, 2001, based upon alleged lack of subject matter jurisdiction, lack of personal jurisdiction, res judicata, statute of limitations, insufficiency of service and failure to state a claim upon which relief can be granted. Featherly also filed a Motion to Dismiss [Doc. No. 8-1], based upon the same grounds as those enunciated by Hardwick. No appearance has been made by the alleged Clifford H. Hardwick & Lynn G. Featherly Partnership, since according to defendant Hardwick:

> There is no such partnership and never has been. This is purely a creation of the Plaintiff as part of his false and frivolous lawsuit. The only relationship between Featherly and Hardwick is that of client and attorney.

Def. Supp. Brief 12-13.

Plaintiff has responded to each of these motions.

In their respective Motions to Dismiss, Defendants Featherly and Hardwick moved this court for an order pursuant to Fed.R.Civ.P. 12(b) [page 4] dismissing Plaintiff's Complaint [Doc. No. 1-1].

The Court in its March 7, 2002 Order [Doc. No. 28-1] found that Plaintiff's Complaint alleged causes of action arising out of the civil suit filed on December 23, 1998, against Featherly and TLA in the Fulton County Superior Court of Georgia (Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action

No. 1998 CV 03450) and the divorce petition (Lynn G. Featherly v. Ned B. Majors, Civil Action No. 1999 CV 05182) filed on February 16, 1999. In its Order, this court concluded that the decision of the Fulton County Superior Court and Supreme Court of Georgia was res judicata to these claims.

III. DISCUSSION

Motions for reconsideration are not generally favored, and should be filed only when it is deemed "absolutely necessary" by the movant. LR 7.2(E) NDGa. More specifically, "[a] motion for reconsideration is not an opportunity for the moving party and its counsel to instruct the Court on how the Court 'could have done it better' the first time. Rather, the motion should be reserved for certain limited situations, namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice." Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 916 F.Supp. 1557, 1560 (N.D.Ga. 1995), aff'd 97 F.3d 1242 (11th Cir. 1996) (citing Kern-Tulare Water Dist. v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal. 1986), aff'd in part, rev'd in part, 828 F.2d 514 (9th Cir. 1987), cert. denied, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988); see also, McCoy v. Macon Water Authority, 966 F.Supp. 1209, 1223 (M.D.Ga. 1997) (a "motion for reconsideration is not an opportunity for a party to improve upon his arguments or try out new arguments; nor is it properly a forum for a party to vent his dissatisfaction with the Court's reasoning").

At the outset, with respect to Defendant Featherly, the court's ruling has not changed from its March 7, 2002 Order [Doc. No. 28-1]. Plaintiff's Complaint [page 5] alleges causes of action arising out of the civil suit filed on December 23, 1998, against Featherly and TLA in the Fulton County Superior Court of Georgia (Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action No. 1998 CV 03450) and the divorce petition (Lynn G. Featherly v. Ned B. Majors, Civil Action No. 1999 CV 05182) filed on February 16, 1999.

The matter of Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action No. 1998 CV 03450 was resolved by a jury verdict in Fulton County Superior Court. On January 17, 2002, the jury entered a verdict and found for Featherly as to Plaintiff's claims and for Plaintiff as to Featherly's claims. Neither party was awarded any money. The matter of Lynn G. Featherly v. Ned B. Majors, Civil Action No. 1999 CV 05182 was resolved by the trial court granting summary judgment in Plaintiff's favor.

The Federal Rules of Civil Procedure require that all claims be combined into one cause of action. Plaintiff's tort claims against Defendant Featherly were litigated in the Fulton County Superior Court. Plaintiff's tort action in Fulton County Superior Court should have encompassed all of his alleged claims that are set forth herein. Plaintiff cannot maintain two separate tort actions involving the same facts, same defendants in two separate courts. No matter how many ways Plaintiff can create to restate his claim the underlying actions alleged are those alleged in his state cases which have now been adjudicated. The decision

of the Fulton County Superior Court and Supreme Court of Georgia is res judicata to these claims.

With respect to Defendant Hardwick, the court will provide further analysis for its ruling in the March 7, 2002 Order granting Hardwick's Motion to Dismiss. Lastly, with regard to Defendant The Clifford H. Hardwick & Lynn G. Featherly Partnership, the court finds this alleged Defendant is a non-existent party. [page 6]

a. Civil Conspiracy

Plaintiff asserts that Defendants Featherly and Hardwick initiated an alleged conspiracy to negate Plaintiff's civil allegations in Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action No. 1998 CV 03450.

A civil conspiracy claim for damages requires a showing that two or more persons have engaged in conduct which constitutes a tort. Savannah College of Art & Design, Inc. v. School of Visual Arts of Savannah, 219 Ga.App. 296, 464 S.E.2d 895 (1995). "It is well-settled that a plaintiff cannot maintain an action for a conspiracy in the absence of actionable underlying conduct. A conspiracy is a combination of two or more persons to accomplish an unlawful end or to accomplish a lawful end by unlawful means ... Where a civil liability for a conspiracy is sought to be imposed, the conspiracy of itself furnishes no cause of action. The gist of the action, if a cause of action exists, is not the conspiracy, but the tort committed against the plaintiff and the resulting damage." Ass'n Services, Inc., v. Smith, 549 S.E.2d 454, 460 (Ga.App. 2001).

The court finds that the torts alleged by Plaintiff do not form the basis for a civil conspiracy claim. Accordingly, the conspiracy claim alleged by Plaintiff is hereby dismissed.

b. Malicious Prosecution with Ulterior Motive and Abusive Litigation

Because the court is unclear as to the which tort claim Plaintiff is alleging in his Complaint, the court will discuss both malicious prosecution and abusive litigation tort claims.

In his Complaint, Plaintiff asserts that Defendants [*sic*] initiation of the Divorce Petition was in fact a malicious prosecution and filed for the sole purpose of sabotaging Plaintiff's civil suit filed on December 23, 1998, against Featherly and TLA in the Fulton County Superior Court of Georgia (Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc., Civil Action Nos. 1998 CV 03450).

The term "malicious prosecution" is confined to the pursuit of a criminal [page 7] action and not one for the recovery of damages arising out of a civil tort. Atlantic Mut. Ins. Co. v. Atlantic Datcom, Inc., 139 F.3d 1344 (11th Cir. 1998). Pursuant to O.C.G.A. Section 51-7-40,

> A criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action.

The elements of malicious prosecution include: (1) prosecution for a criminal offense; (2) the prosecution instigated under a valid warrant, accusation, or

summons; (3) termination of the prosecution in favor of the plaintiff; (4) malice; (5) want of probable cause; and (6) damage to the plaintiff. Medoc Corp. v. Keel, 166 Ga.App. 615, 305 S.E.2d 134 (1983); Young v. City of Atlanta, 631 F.Supp. 1498 (N.D.Ga. 1986).

Because the Divorce Petition filed by Defendants was a civil action, Plaintiff fails to meet the elements of malicious prosecution. Accordingly, Plaintiff's claim of malicious prosecution is dismissed.

Plaintiff's claim also fails under the Georgia Tort claim [*sic*] for Liability for Abusive Litigation pursuant to O.C.G.A. Section 51-7-81. Plaintiff filed motions for abusive litigation in Fulton County Superior Court in the matter of Lynn G. Featherly v. Ned B. Majors, Civil Action No. 1999 CV 05182, and the trial court denied the motion finding that there was merit to the initial complaint, or in the alternative, that the complaint was not brought without some foundation. Plaintiff then appealed that decision to the Georgia Court of Appeals. Because the Georgia Court of Appeals was not the proper court for the appeal, the case was transferred to the Georgia Supreme Court. The appeal was denied and the court also denied the petition for a rehearing . Accordingly, the decision of the Fulton County Superior Court and Supreme Court of Georgia is res judicata to these claims.

Further, an action for abusive litigation "requires the final termination of the proceeding in which the alleged abusive litigation occurred and must be [page 8] brought within one year of the date of final termination." O.C.G.A. Section 51-7-84(b). The underlying civil proceeding in which the alleged abuse occurred, the Divorce Petition, terminated on August 2, 1999, the date on which the Superior Court of Fulton

County granted Plaintiff's Motion for Summary Judgment. Plaintiff filed the Complaint in the above-referenced matter on February 15, 2001, approximately one and a half years after the final termination of the Divorce Petition. Accordingly, Plaintiff is time-barred from filing an abusive litigation claim.

c. Tortious Interference of a South Carolina Ceremonial Marriage Contract and Tortious Interference of South Carolina Step-Parent Adoption

In his Complaint, Plaintiff asserts that Defendants intentionally filed the Divorce Petition to imply that his marriage to Ms. Ferguson was void. He further claims that the Divorce Petition also interfered with the adoption of Ms. Ferguson's daughter.

Plaintiff and Ms. Ferguson were married on March 8, 1998 and Plaintiff asserts that he "almost immediately thereafter legally adopted his wife's ... fifteen (15) year old daughter." [See Plaintiff's Response, Doc. No. 9-1, p. 3]. Because the marriage and adoption took place before the Divorce Petition was filed, the court finds no evidence to support Plaintiff's claims of interference. Accordingly, Plaintiff's claims are hereby dismissed.

d. Tortious Interference with Property

Plaintiff asserts that Defendants Featherly and Hardwick's filing of the Divorce Petition resulted in a tortious interference with his property. He bases this tort claim on the underlying tort claim of malicious prosecution. As stated above, Plaintiff fails to meet the elements of malicious prosecution. Accordingly,

Plaintiff's claim of tortious interference with property is hereby dismissed.

e. Defamation of Character

Plaintiff asserts that Defendants falsely accused him of the commission of [page 9] the crime of Bigamy in the Divorce Petition filed on February 16, 1999. [See Complaint, Par. 127]. Plaintiff contends that this accusation caused injury to his reputation.

Under Georgia law, actions for injuries to reputation must be brought within one year from date of alleged defamatory acts, regardless of whether or not Plaintiff had knowledge of the act or acts at the time of their occurrence. Davis v. Hospital Auth., 154 Ga.App. 654, 269 S.E.2d 867 (1980).

The statute of limitations began to run on February 16, 1999, the date the Divorce Petition was filed in the Superior Court of Fulton County. Plaintiff filed the above-referenced matter on February 15, 2001, approximately two years after the Divorce Petition was filed. Accordingly, Plaintiff's claim of defamation is barred by the statute of limitations.

f. Intentional infliction of emotional distress by citizens and residents of the State of Georgia against a citizen and resident of the State of South Carolina.

The gravamen of Plaintiff's intentional infliction of emotional distress claim is the Defendants' act of filing an abusive lawsuit. The abusive litigation statute provides the exclusive remedy for claims of abusive litigation. O.C.G.A. Section 51-7-85. Pursuant to O.C.G.A. Section 51-7-85, Plaintiff is precluded from

filing a claim of intentional infliction of emotional distress as a remedy for abusive litigation.

IV. CONCLUSION

Based on the foregoing, Plaintiff's Motion for Reconsideration [Doc. No. 29-1] is hereby **DENIED.**

SO ORDERED this 25th day of November, 2002.

/s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

Filed: Aug. 22, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16930-HH

NED B. MAJORS,

Plaintiff-Appellant,

versus

CLIFFORD H. HARDWICK,
LYNN G. FEATHERLY,
THE CLIFFORD H. HARDWICK & LYNN
G. FEATHERLY PARTNERSHIP,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia,

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d ____).
Before: CARNES, MARCUS and WILSON, Circuit Judges.
PER CURIAM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/s/ SM
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

Filed: June 18, 2003
Issued as Mandate:
Sep. 02, 2003

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16930

District Court Docket No.
01-00447-CV-CC-1

NED B. MAJORS,

Plaintiff-Appellant,

versus

CLIFFORD H. HARDWICK,
LYNN G. FEATHERLY,
THE CLIFFORD H. HARDWICK & LYNN
G. FEATHERLY PARTNERSHIP,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia,

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 18, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

Filed: Aug. 29, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Ned B. Majors, Plaintiff,	)	C/A No. 4:99-4052-24BF
v.	)	
	)	**ORDER**
Clifford H. Hardwick, Lynn G. Featherly, and the Clifford H. Hardwick & Lynn G. Featherly Partnership, Defendants.	)	

On December 9, 1999, *pro se* Plaintiff Ned B. Majors, who is an attorney admitted to the Georgia State Bar, filed a complaint against *pro se* Defendants Clifford H. Hardwick ("Hardwick"), who is also an attorney admitted to the Georgia State Bar; Lynn G. Featherly ("Featherly"); and the Clifford H. Hardwick & Lynn G. Featherly Partnership. The complaint alleges the following causes of action: civil conspiracy; malicious prosecution with ulterior motive; abuse of process; abusive litigation; bad faith and frivolous filing; tortious interference with a South Carolina ceremonial marriage contract; tortious interference with a South Carolina step-parent adoption; defamation of character; intentional interference with property; and intentional infliction of emotional distress. Plaintiff seeks actual, special, and punitive

damages in the amount of Fifty Million Dollars ($50,000,000.00).

This matter is before the court on Defendants' motions to dismiss. Hardwick filed a motion to dismiss all of Plaintiff's claims on January 14, 2000. The basis of Hardwick's motion is lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, and failure to state a claim [page 2] upon which relief can be granted. Likewise, on February 8, 2000, Featherly filed a motion to dismiss on the same grounds as those enunciated by Hardwick.

By order filed January 20, 2000, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), Plaintiff was advised of the nature of a motion to dismiss and the possible consequences if he failed to respond adequately. Plaintiff filed a response in opposition to Hardwick's motion to dismiss on February 16, 2000. A response in opposition to Featherly's motion to dismiss was filed by Plaintiff on February 24, 2000. Also pending before the court is Plaintiff's motion for default judgment against Hardwick. At the time of this ruling, no appearance has yet been made by the alleged Clifford H. Hardwick & Lynn G. Featherly Partnership.[4]

In accordance with 28 U.S.C. Section 636(b) and Local Rule 73.02, D.S.C., this matter was referred to United States Magistrate Judge Terry L. Wooten for a

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[4] [Footnote 1:] According to Hardwick: "There is no such partnership and never has been. This is purely a creation of the plaintiff, Ned B. Majors as part of his false and frivolous lawsuit. The only relationship between Featherly and Hardwick is that of client and attorney." (Def.'s Mem. Supp. Mot. Dismiss at 2-3.)

Report and Recommendation. The Magistrate Judge filed a Report and Recommendation on April 27, 2000, recommending that Defendants' motions to dismiss be granted. Plaintiff thereafter filed objections to the Report and Recommendation on May 10, 2000. Featherly then filed a response to Plaintiff's objections on June 9, 2000.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility for making a final determination remains with this court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The court is charged with making a *de novo* determination of any portions of the Report of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by [page 3] the Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. Section 636(b)(1).

The court has reviewed the Report and Recommendation, objections, pleadings, memoranda, and exhibits of record in this case. The court concludes, in accordance with the Magistrate Judge's Report and Recommendation, that Defendants' motions to dismiss should be granted.

FACTS

Plaintiff and Featherly jointly owned Tax Lien Acquisitions, Inc. ("TLA"), a corporation organized under the laws of Georgia. Plaintiff was TLA's chief executive officer and Featherly was the corporation's president and chief financial officer. At the time of TLA's creation, Plaintiff and Featherly resided together in Georgia. The personal relationship between Plaintiff

and Featherly deteriorated. Eventually, Plaintiff met and married Patricia Ferguson, a licensed South Carolina attorney, and moved from Georgia to South Carolina.

On December 23, 1998, Plaintiff filed suit against Featherly and TLA in the Fulton County Superior Court of Georgia (*Ned B. Majors v. Lynn G. Featherly and Tax Lien Acquisitions, Inc.,* Civil Action No. 1998CV03450) alleging that Featherly had breached her fiduciary duties to Plaintiff and TLA. According to Plaintiff, he filed suit in Georgia since all of Featherly's allegedly tortious acts against TLA and Plaintiff, up to that time, had been committed in Georgia. (Compl. Par. 18.) That case currently is pending.

Featherly sought legal representation in the above referenced case from Hardwick, a duly licensed Georgia attorney with his principal place of business in Georgia. Plaintiff alleges that Featherly and Hardwick then formed a "secret partnership" whereby they conspired to assert that Plaintiff and Featherly had entered into a common law marriage as the result of their living together in Georgia. This "secret partnership," according to Plaintiff, would allegedly benefit Featherly by [page 4] providing her with legal representation and benefit Hardwick by enabling him to receive TLA assets. Plaintiff admits that Featherly and Hardwick are residents of the state of Georgia and have been at all times relevant to the instant action before this district court. (Compl. Sections 4,5.)

On February 16, 1999, Featherly filed a petition for divorce against Plaintiff in the Fulton County Superior Court of Georgia (*Lynn G. Featherly v. Ned B. Majors,* Civil Action No. 1999CV05182). Hardwick represented Featherly in this matter. Plaintiff filed a

motion for summary judgment in the divorce case, and the motion initially was denied. Upon a motion for reconsideration, Judge Cynthia Wright set aside her prior decision and granted summary judgment in favor of the Plaintiff after learning that Featherly had previously testified, in other non-related cases, that she had never been married. Plaintiff then filed a motion in Georgia state court to recover attorney's fees and costs for abusive litigation. After the trial court denied Plaintiff's motion, Plaintiff appealed to the Georgia Court of Appeals. The court of appeals transferred the case to the Georgia Supreme Court. The Supreme Court denied Plaintiff's appeal. Plaintiff filed a motion for reconsideration, but that motion was also denied by the Georgia Supreme Court.

DISCUSSION

I. Defendants' Motions to Dismiss

The court's jurisdiction in the present action is based solely on diversity of citizenship. 28 U.S.C. Section 1332(a)(1). Given this fact, the court must consider the appropriate venue for this case. In this regard, 28 U.S.C. Section 1391(a) provides:

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3)

> a judicial district in which any defendant is [page 5] subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

"One of the central purposes of statutory venue is to ensure that a defendant is not 'haled into a remote district having no real relationship to the dispute.'" *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995) (quoting *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994)). When venue is challenged, the plaintiff has the burden to prove that venue is proper in the forum state. *Magic Toyota, Inc. v. Southeast Toyota Distrib., Inc.*, 784 F.Supp. 306, 316 (D.S.C. 1992). Additionally, a plaintiff must prove that venue is proper as to each claim asserted in the complaint and as to each defendant. *Id.* Failure to bring an action in the appropriate judicial district may entitle a defendant to dismissal of a plaintiff's case pursuant to Fed.R.Civ.P. 12(b)(3).

Plaintiff admits that each Defendant is a resident of Georgia. (Compl. Par. 4-6). Thus, South Carolina is not the proper venue under Section 1391(a)(1) since the Defendants reside outside of this state. According to this section, Plaintiff's action appropriately lies within the state of Georgia.

Alternatively, Plaintiff can establish that venue is proper in South Carolina if he can show that a substantial part of the events or omissions giving rise to his claim occurred in this judicial district or that a substantial part of the property that is the subject of his action is situated within this district. 28 U.S.C. Section

1391 (a)(2). However, Plaintiff has failed to meet this burden.

The focus of Plaintiff's complaint is on events that allegedly occurred in Georgia. For example, Plaintiff contends that Defendants conspired to injure his personal and financial well-being by filing the divorce action. Plaintiff also alleges that Hardwick and Featherly set out to dilute his interest in the TLA partnership. However, these alleged acts took place in Georgia.

With respect to Plaintiff's claims that Hardwick and Featherly tortiously interfered with his South Carolina marriage contract, his South Carolina step-parent adoption, and his interest in South [page 6] Carolina property owned by TLA, this court concludes that these allegations fall short of meeting the venue requirement as set forth in Section 1391(a)(2). As the Magistrate's Report and Recommendation aptly states: "[I]f such allegations are true, they occurred as a direct and proximate result of the substantial alleged conduct and/or substantial alleged omissions occurring in the State of Georgia." (Report and Recommendation at 11.)

Furthermore, Plaintiff admits that "the tortious acts were committed [by Featherly and Hardwick] in Georgia." (Plaintiff's Objections to Judge Wooten's Report and Recommendation at 4.) However, Plaintiff argues that venue is appropriate in this district since he allegedly "suffered the injuries almost 100% in South Carolina." *Id.* The court disagrees with Plaintiff's assertion. While Plaintiff's alleged injuries are meaningful when determining damages in this case, they are not themselves part of the events that gave rise to Plaintiff's claims. "Information regarding damages is important, but it is insubstantial and not the type of

event or conduct anticipated by Section 1391(a)(2)." *Rodriquez v. Jones*, No. 99 C 4045, 1999 WL 965714, at *1 (N.D.Ill. Oct. 12, 1999).

The court concludes that a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Georgia. Thus, pursuant to Section 1391(a)(2), venue in this case is not properly situated within the district of South Carolina.[5]

Section 1391(a)(3) also provides Plaintiff no basis for establishing venue in South Carolina. This clause permits venue in any "judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may [page 7] otherwise be brought." 28 U.S.C. Section 1391(a)(3). The court is aware of no reason this action may not be brought in Georgia. As such, Plaintiff cannot rely on Section 1391(a)(3) to bring suit in this state. The court concludes that venue is not proper under any test set forth in Section 1391(a).

Having decided that venue in this case is improperly situated in South Carolina, the court must determine whether Plaintiff's actions should be dismissed or transferred to another judicial district.

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[5] [Footnote 2:] This court need not address the alternative offered by the second part of Section 1391(a)(2). That part states that venue is proper in a judicial district in which "a substantial part of the property that is the subject of the action is situated." 28 U.S.C. Section 1391(a)(2). Because the subject matter of Plaintiff's action does not involve property situated in South Carolina, the later part of Section 1391(a)(2 is not available to Plaintiff as a basis for asserting venue in this state.

Pursuant to 28 U.S.C. Section 1406(a), "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the best interest of justice, transfer such case to any district or division in which it could have been brought." The decision to transfer a case or to dismiss it in the interest of justice rests within the sound discretion of this district court. *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, *cert. denied*, 467 U.S. 1210 (D.C. Cir. 1983) [*sic*].

The parties have advanced no reasons to support a finding that justice would best be served by a transfer of this case to the Georgia federal courts, nor does this court discern any such reasons. The court concludes that dismissal of the within action is proper under Section 1406(a).

II. Plaintiff's Motion for Default Judgment

Having concluded that the present action should be dismissed for improper venue pursuant to Fed.R.Civ.P. 12(b)(3), the court need not rule on Plaintiff's motion for default judgment.

CONCLUSION

For the reasons set forth, IT IS ORDERED that Plaintiff's complaint be dismissed, without prejudice, for improper venue pursuant to Fed.R.Civ.P. 12(b)(3). Given this ruling, Plaintiff's [page 8] motion for default judgment is deemed moot.

IT IS SO ORDERED

/s/ Margaret B. Seymour
Margaret B. Seymour
United States District Judge

August 28, 2000
Spartanburg, South Carolina

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

STATUTES AND RULES INVOLVED

STATE OF GEORGIA

Ga. Code Ann. Section 9-2-61 (*Renewal of case after dismissal.*) (Supp. 2002):

(a) When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of Code Section 9-11-41; provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.

(b) This Code section shall not apply to contracts for the sale of goods covered by Article 2 of Title 11.

(c) The provisions of subsection (a) of this Code section granting a privilege of renewal shall apply if an action is discontinued or dismissed without prejudice for lack of subject matter jurisdiction in either a court of this state or a federal court in this state.

Ga. Code Ann. Section 9-11-15 (*Amended and supplemental pleadings.*) (1993):

(a) *Amendments.* A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. Thereafter the party may amend his pleading only by leave of court

or by written consent of the adverse party. Leave shall be freely given when justice so requires. A party may plead or move in response to an amended pleading and, when required by an order of the court, shall plead within 15 days after service of the amended pleading, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. ***

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. ***

(d) *Supplemental pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Ga. Code Ann. Section 9-11-41 (*Dismissal of actions; recommencement within six months.*) (1993):

(a) *Voluntary dismissal; effect.* ***

(b) *Involuntary dismissal; effect thereof.* *** The effect of dismissals shall be as follows: (1) A dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits; and (2) Any other dismissal under this subsection and any dismissal not provided for in this Code section, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, does operate as an adjudication upon the merits unless the court in its order for dismissal specifies otherwise.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* ***

(d) *Cost of previously dismissed action.* If a plaintiff who has dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the plaintiff shall first pay the court costs of the action previously dismissed.

(e) *Dismissal for want of prosecution; recommencement.* ***

Ga. Code Ann. Section 9-12-40 (*Judgment conclusive between which persons and on what issues.*) (1993):

A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

FEDERAL

Fed.R.Civ.P. 8 (*General Rules of Pleading*)

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. ***

(c) Affirmative Defenses. ***

(d) Effect of Failure to Deny. ***

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable,

or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Fed.R.Civ.P. 15 (Amended and Supplemental Pleadings)

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. ***

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or ***

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefore.

Fed.R.Civ.P. 41 (*Dismissal of Actions*)

(a) Voluntary Dismissal: Effect Thereof. ***

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. ***

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court ***